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CHARLES ELMORE CROPLEY

No. 569

IN THE SUPREME COURT OF THE UNITED STATES

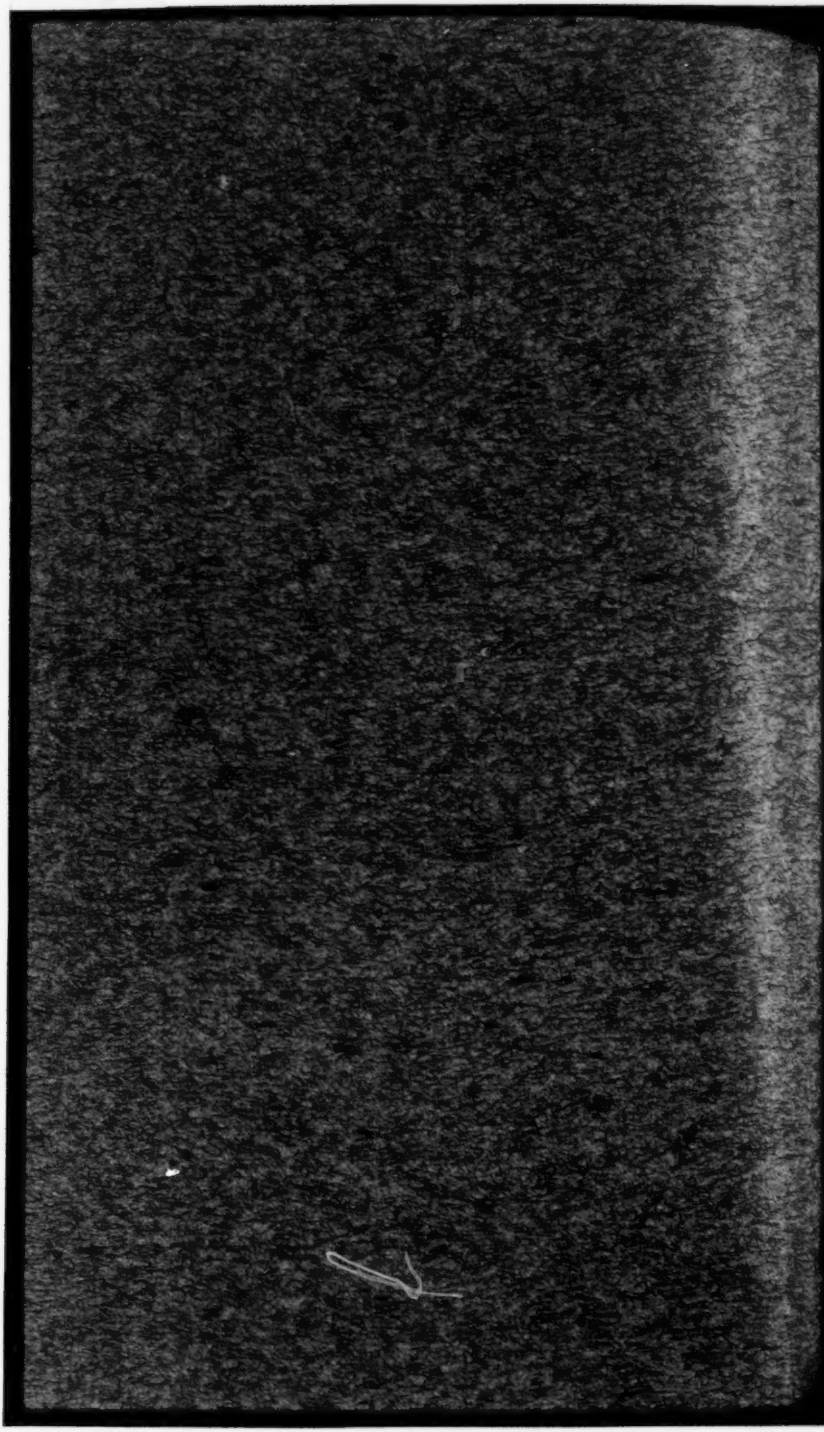
OCTOBER TERM, 1949

HENRY M. BEVERAGE, ADMINISTRATOR OF THE ESTATE OF DENNIS ROSCOE BEVERAGE, DECEASED, ET AL., PETITIONERS

vs.

FARM BUREAU MUTUAL AUTOMOBILE INSURANCE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT



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v.

FARM BUREAU MUTUAL AUTOMOBILE INSURANCE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioners, by their counsel herein, pray that a writ of certiorari be issued to review the judgment of the Court of Appeals for the Fourth Circuit entered in the above-entitled case on October 3, 1949.

OPINIONS BELOW

The opinion of the District Court (R. 11-30) is reported at 83 F. Supp. 383. The opinion of the Court of Appeals for the Fourth Circuit (R. 34-47) is officially reported in 177 F. (2) 793. The dissenting opinion of Parker, Circuit Judge, is set forth in the record at R. 48-49.

JURISDICTION

The judgment of the Court of Appeals (R. 50) was entered on October 3, 1949. A petition for rehearing time-

ly filed (R. 51-60) was denied by order of the Court of Appeals entered on November 14, 1949 (R. 61). The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

An insurance company, the respondent here, issued a policy in which the company promised "to pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages, including damages for care and loss of services, because of bodily injury, including death at any time resulting therefrom, sustained by any person or persons, caused by accident and arising out of the ownership, maintenance or use of the" insured's truck. The petitioners here, who are persons injured, or the personal representatives of persons killed in a collision with insured's truck, recovered judgments against the insured solely on the ground of his negligence. The insured is insolvent and the judgments are unsatisfied. The respondent insurance company, in the present proceeding instituted by it to determine its obligations under the policy, attempts to assert that the collision was *intentionally* and not *negligently* caused by its insured and hence not caused by accident. In this context the following questions arise:

1. Are judgements recovered against the insured on the sole ground of negligence within the coverage of the insurance company's promise "to pay . . . all sums which the insured *shall become obligated to pay by reason of the liability imposed upon him by law* for damages, . . . because of bodily injury *** caused by accident . . ."; or is the insurance company's promise one "to pay for bodily injury caused by accident" so that the insurance company is free to assert that in fact there was no "accident". For additional clarity, we phrase the same question in somewhat different language: Has the insurance company promised to pay legal liabilities of a certain description, that is judgments for damages found to be caused by accident (negligence), or has the insurance company promised only to pay for injuries which are in fact caused by "accident." If the Court decides that the insurance company has promis-

ed to pay precisely the kind of judgments which petitioners have obtained against the insured, there is no further question presented. If the Court should not so decide, then the following question arises:

2. Do the judgments obtained against the insured on the sole ground of his negligence estop the insurance company from asserting that the injuries covered in the judgments were not in fact negligently caused by the insured. If the Court finds such estoppel, no further question arises; if the Court should find otherwise, two additional questions arise:

3. Are the injuries sustained in the collision by persons other than the insured not "caused by accident" if the insured intentionally caused the collision.

4. Would the public policy of the Commonwealth of Virginia forbid payment on the policy if the insured intentionally caused the collision.[1]

STATUTES INVOLVED

The questions presented are not essentially questions of statutory interpretation. Statutes, pertinent to the discussion of "Reasons for Granting the Writ", are sufficiently noted therein.

STATEMENT

This proceeding was begun by the respondent against petitioners by complaint filed in the United States District Court for the Western District of Virginia, Harrisonburg Division. The complaint sought a declaratory judgment that respondent is not liable to petitioners for injuries sustained in a collision with a truck covered by an automobile liability insurance policy issued by respondent (R. 2-5).

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1. If the writ is granted, we reserve one additional question for argument on the merits. We will urge that respondent insurance company is conclusively bound to pay the judgments obtained in the suits against its insured because it defended the insured in those suits to the extent of the entry of an appearance and a plea of the general issue in his behalf.

The District Court found the insurance company liable under its policy and entered judgment for petitioners (R. 30-32). On appeal, the Court of Appeals reversed (R. 50). The facts pertinent for decision largely appear in the pleadings, are not in dispute, and may be briefly summarized as follows:

Respondent issued and delivered an automobile liability insurance policy in Virginia to one Wagner (R. 2). By "Coverage F" of the policy, respondent agreed

> "To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages . . . because of bodily injury, including death at any time resulting therefrom, sustained by any person or persons, caused by accident and arising out of the . . . use of ***".

Wagner's truck (R. 2; 23). Respondent also agreed to defend for Wagner in any suit brought against him for such claims "even if such is groundless, false or fraudulent" (R. 23).

On April 19, 1947, while the policy was in force, Wagner, in operating his truck in Virginia, collided with a private automobile carrying five persons. Three persons in the automobile were killed and two seriously injured (R. 2; 12).

The injured persons and the personal representatives of the persons killed sued Wagner for damages in the Circuit Court of Highland County, Virginia. The complaints in these state court actions were based solely on allegations of Wagner's negligence in causing the collision. Pursuant to respondent's obligation to defend against such claims, counsel employed by respondent entered an appearance in the state court in behalf of Wagner and filed pleas of the general issue (R. 3; 6; 8; 12; 18).

Before the state court actions came on for trial, Wagner was convicted by the Commonwealth of Virginia of murder in the second degree presumably on the charge that he had wilfully and intentionally driven his truck into the private automobile, thus causing the death of one of its occupants. Following Wagner's conviction, counsel em-

ployed by respondent withdrew from the state court actions (R. 4; 12-13).

After withdrawal of respondent's counsel, the state court actions came on for trial. All of the evidence introduced (Wagner offered none) pertained solely to negligence; all charges to the jury were concerned solely with negligence, both negligence by Wagner and contributory negligence by the plaintiffs; all verdicts were rendered for the plaintiff on the sole ground of Wagner's negligence; and, accordingly, a judgment was entered in each case against Wagner and solely because of his negligence in causing the collision (R. 3; 7; 18-21).

Executions against Wagner on the judgments obtained in the state court actions were returned unsatisfied because of Wagner's complete insolvency; and the judgment creditors (plaintiffs in the state court actions and petitioners here) called upon respondent for payment of the judgments to the amount of its policy (R. 4; 9; 13).

Respondent, an Ohio corporation, then instituted this proceeding in the District Court against petitioners, all citizens of Virginia (R. 2; 6); and requested a decaratory judgment of non-coverage of petitioners' judgments under the policy issued to Wagner (R. 2-5).

Respondent does not claim or even intimate fraud or collusion in the state court judgments against Wagner. Nor does respondent claim any lack of notice and opportunity to defend for Wagner on the issue of negligence in the state court actions. And respondent does not assert that injuries caused by Wagner's negligence are not "accidental". Respondent asserts that the injuries of petitioners and petitioners' decedents were not caused by Wagner's negligence as decided by the state court judgments, but by the intentional driving of his truck into petitioners' car. If so, says respondent, the injuries were outside the policy as not "caused by accident" (R. 2-5).

On the foregoing facts, the District Court entered judgment for petitioners because: (1) the liability imposed upon Wagner by law as represented by the state court judgments is precisely the "liability imposed by law upon [Wagner]" which respondent has bound itself to pay; and (2) in any event, with notice and opportunity to defend for Wagner, and in the absence of fraud or collu-

sion, respondent is estopped by the state court judgments from denying that the injuries in question were caused by Wagner's negligence (R. 16-30).

The Court of Appeals held first, in effect, that the policy is one which promises only to pay for "injuries caused by accident" rather than for certain types of "liability imposed by law"; second, that injuries caused by an intentional act of the insured are not "caused by accident"; and to decide otherwise would be contrary to public policy, although the Court does not state whose public policy would be offended in that event (R. 36); and third, that respondent is not estopped by the state court judgments from asserting that Wagner was not a negligent wrongdoer because respondent could not, in defending Wagner in the state court actions, have shown that Wagner was an intentional wrongdoer (R. 34-47).

Judge Parker dissented in an opinion of one and one-half pages (R. 48-49), the gist of which is contained in the sentence (R. 48):

> "I think that the judgment appealed from should be affirmed for reasons adequately stated in the opinion of the learned judge below, which is in accord with all decided cases dealing with the question involved."

REASONS FOR GRANTING THE WRIT

1. *In holding the insurance policy in suit to promise in effect payment only for "injuries which are in fact caused by accident" and not payment for "liabilities imposed by law" upon the insured on the ground of "accident", the Court below has decided a question of Virginia law in a way that is probably in conflict with the applicable law of Virginia.*—Construction of respondent's promise to pay is, in the circumstances of this case, a question of Virginia law. Respondent promised "to pay . . . all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages *** because of bodily injury, . . . sustained by any person or persons, caused by accident and arising out of the . . . use of the automobile" (R. 23). Such a clause, in forms varying as

to minor details not pertinent here, appears to be the usual coverage clause in policies of automobile liability insurance. In any event, our court of last resort in Virginia holds substantially the same clause to be a contract for indemnification against legal liability. *Indemnity Co. v. Davis' Adm'r.*, 150 Va. 778.[2]

Further, it is uniformly held in Virginia that the obligation of an indemnitor on a contract of indemnity against "legal liability" or "liability imposed by law" is fixed and determined by judgment against the indemnitee. *Indemnity Co. v. Davis' Adm'r., supra; Fentress v. Rutledge,* 140 Va. 685; *State Farm Mut., Etc. v. Justis,* 168 Va. 158. And finally, in construing insurance policy clauses on coverage and defense of suits, not pertinently different from those in Wagner's policy, our highest court holds that the obligation of the insurance company to defend suits against the insured is correlative with its obligation to indemnify. Hence, the insurance company is required to defend the insured if the complaint against the insured states a covered claim, and not obligated to defend if the complaint does not state a covered claim. *London Guarantee & Accident Co. v. C. B. White & Bros.*, 188 Va. 195. The premise of the *London Guarantee & Accident Co.* decision is that a judgment finding the type of legal liability covered by the policy will be within the insurance company's promise to pay.

In substance, the Virginia decisions hold promises such as the coverage clause in question here to be promises to pay judgments founded upon covered legal liability. The Court of Appeals, in derogation of the Virginia law, has followed its own bent; for that Court holds the coverage clause not to be one to pay legal liability as *fixed* by judgment against the insured, but merely a promise to pay injuries in fact caused by accident.

2. *In holding that respondent is not estopped by the*

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2. It is noteworthy that the insurance company in *Indemnity Co. v. Davis' Adm'r.* did not deny that its contract was one of indemnity. Indeed, the issue there was whether the contract was one of indemnity to pay legal liabilities imposed by law, that is, judgments, or only to pay such judgments as are first *paid* by the insured.

state court judgments from claiming that the collision was not caused by Wagner's negligence, the decision of the Court below is in conflict with the law of Virginia, with the decisions of this Court, and with the decisions of other Federal Circuit Courts of Appeal.—Whether the problem of judgment by estoppel here presented is controlled by federal decisions or by the law of Virginia is a nice question. See *American Surety Co. of New York v. Babb,* 74 F. (2) 542 (C. C. A. 4).

If federal decisions be controlling, the decision below is in conflict with the settled line of decisions of this Court in *Robbins v. Chicago City,* 4 *Wall.* 657; *Stovall v. Banks,* 10 Wall. 583; *Washington Ice Co. v. Webster,* 125 U. S. 426; *Washington Gas-Light Co. v. Dist. of Columbia,* 161 U. S. 316; *William W. Bierce, Ltd. v. Waterhouse,* 219 U S. 320; (Chico Co. v. Baxter, 308 U.S. 371, 84 L ed. 329); and in conflict with the decisions of other Circuit Courts of Appeal in *Jones v. Zurich General Accident and Liability Ins. Co.,* 121 F. (2) 761 in the Second Circuit; *Alabama Title & Trust Co. v. Millsap,* 71 F. (2) 518 in the Fifth Circuit; and *B. Roth Tool Co. v. New Amsterdam Casualty Co.,* 161 Fed. 709, and *International Indemnity Co. v. Steil,* 30 F. (2) 654, in the Eighth Circuit.

If state law be controlling, the decision of the Court of Appeals is in conflict with the law of Virginia as held by our highest Court in *Title Corp. v. Tie Co.,* 152 Va. 698, and by the Court below in *State-Planters' Bank & Trust Co. v. First National Bank,* 76 F. (2) 527, (c. d. 295 U. S. 764).

The foregoing decisions of this Court, of the Virginia courts, and of other Circuit Courts of Appeal all express and apply to varied situations the heretofore well-settled law that an indemnitor is, in the absence of fraud or collusion, bound by all facts found in a judgment against his indemnitee, if the indemnitor, as here, had notice and opportunity to defend for the indemnitee. The rule operates mutually to bind the indemnitee, too,—sometimes to the benefit of an insurance company as in *B. Roth Tool Co. v. New Amsterdam Casualty Co.;* and *Alabama Title & Trust Co. v. Millsap;* both *supra.*

Nevertheless, the Court below holds respondent not estopped by petitioners' judgments against Wagner because

it could not in defending Wagner against charges of negligence show that his acts were intentional. As Judge Parker, dissenting in the Court below, remarked (R. 49), the defense of Wagner might for that reason be more difficult; but no decision, federal or state, sanctions the avoidance of estoppel by judgment permitted by the Court below. To the contrary, the *Washington Gas-Light Co.*, the *Robbins*, *the Alabama Title and Trust Co.*, the *B. Roth Tool Co.*, and the *Jones* cases, are all decisions applying estoppel by judgment obtained against the indemnitee, although in each of those cases, the indemnitor could not in defending the suit against the indemnitee prove facts claimed to show non-coverage under the contract of indemnification.[3]

3. *In holding that injuries are not "caused by accident" if caused by intentional act of the insured, and that a contrary holding is forbidden by public policy, the decision of the Court below is probably in conflict with applicable Virginia law.*—The Court below regarded the collision from the viewpoint of Wagner, the insured, and held that, if he intentionally drove his truck into the car, the collision was not an "accident".

But the law of Virginia construes "accident" from the viewpoint of the person injured. Even if an injury is intentionally inflicted, the innocent, injured person, nevertheless, has suffered "an accident". This is plain enough in Virginia decisions applicable to fields of insurance cognate to automobile liability insurance. Injuries received by the insured in an assault upon him are held "accidental" under a health and accident insurance policy. *Mutual Ben. Health & Accident Ass'n. v. Ryder*, 166 Va. 446. The death of an insured by intentional killing is "accidental" under a policy of accident insurance. *Standard Accident Insurance Co. v. Walker*, 127 Va. 140. In *Newsoms v. Com. Casualty Ins.*, 147 Va. 471, a case covering the question of "accidental death" under a life insurance policy, the Court stated the following rule to be controlling (p. 474):

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3. The law does not appear to be different in any jurisdiction. See *Stefus v. London and Lancashire Indemnity Co.*, 166 Atl. 339 (N. J.): and *Miller v. United States Fidelity and Casualty Co.*, 291 Mass. 445, both decisions on facts practically identical with those at bar.

> "The definition of accident generally assented to is an event happening without any human agency, or if happening through human agency, an event which, under the circumstances, is unusual and not expected by the person to whom it happens . . . This definition has been so generally used and quoted as not to require additional citation."

And the same rule has been consistently stated and applied in a line of decisions since the *Newsoms* case. *Big Jack Overall Co. v. Bray,* 161 Va. 446; *Hall's Bakery v. Kendrick,* 176 Va. 346; *Dixon v. Norfolk S. B. Etc. Corp.,* 182 Va. 185; *Derby v. Swift* & *Co.,* 188 Va. 336.

Under controlling Virginia law, therefore, respondent would be liable under its policy; for the collision, whether or not intentionally caused by Wagner, was "an event which, under the circumstances, was unusual and not expected by the persons [petitioners and petitioners' decedents] to whom it happened".

And that such result is not prohibited by the public policy of Virginia is sufficiently indicated both by the Virginia decisions apparently requiring respondent's liability and by the public policy of Virginia as exhibited in its legislative enactments.

The statutes of Virginia show an evident legislative concern to achieve so far as possible the payment of appropriate damages to persons innocently injured in the widespread use of motor vehicles. The insurer is liable for covered judgments without prior satisfaction of the judgments by the insured. Insurer and insured may not cancel the policy by agreement after the insured becomes involved in an accident. The death of the insured does not void the policy. And finally the Virginia statutes provide: "No statement made by the insured or on his behalf and no violation of the terms of the policy shall operate to defeat or void the policy so as to bar recovery within the limits provided in this chapter." These are all statutory provisions with specific reference to automobile liability insurance as set forth in the Motor Vehicle Safety Re-

sponsibility Act, Michie, Code of Virginia, 1950, Sec. 46-386 ff. and particularly Sec. 46-498.[4]

Petitioners can sue respondent directly under the provisions of Section 38-238 of the Code of Virginia (Michie) 1950. That section provides for continuance of an automobile liability insurance policy despite insolvency or bankruptcy of the insured, and direct suit by injured parties against the insurer if their judgements against the insured are returned unsatisfied. The same section contains the so-called "omnibus clause" extending the coverage of automobile liability insurance to all persons legally driving the insured's car with his assent. The "omnibus clause" was "conceived for the benefit of the party who had suffered damage by the negligent use of the insured's car when operated by another" (see *Lumbermen's Mut. Cas. v. Indemnity Ins.*, 186 Va. 204, 212); and, under its provisions the insurer is liable to injured parties in cases in which the insured is not. See *Maxey v. American Casualty Co. of Reading*, 180 Va. 285; *Newton v. Employers Liability Assur. Co.*, 107 F. (2) 164 (C. C. A. 4), certiorari denied 309 U. S. 673. It is authoritatively declared that "the entire statute contemplates extending the benefits of a liability policy beyond mere indemnity to the assured". See *Lumbermen's Mut. Co. v. Indemnity Ins.;* supra, at p. 212.

The Virginia decisions construing "accident" from the viewpoint of the injured party, and the Virginia statutes seeking protection for the injured party, sufficiently indicate that Virginia's public policy favors, and does not condemn, respondent's liability; and particularly so since Wagner's insolvency prevents his profiting from that liability.

4. *The questions presented are important.*—The decision of the Court of Appeals finds no authority in its

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4. The Court of Appeals disregards the Motor Vehicle Safety Responsibility Act because it interprets the Act as applying only to automobile liability insurance policies issued to persons who have already been in one accident. But the question here is the public policy of Virginia and it is indicated by the Act whether or not the application of the Act is total or partial. The statute shows what the lawmakers of Virginia think beneficent.

support, and is concerned in the main with distinguishing many authorities against it. These are the hallmarks of the decision that breaks with precedent and sets up new doctrine in the ancient fields of contract and indemnity.

The new doctrine is of considerable importance in the federal field of admiralty. See *Strathleven Steamship Co., Ltd. v. Baulch,* 244 Fed. 412, 415 (C. C. A. 4), certiorari denied 245 U. S. 663. Its greater importance to the Commonwealth of Virginia and its citizens is apparent. But the paramount impingement of the new doctrine is upon the heretofore well-settled judicial precedents of the states of the union in the particular field of automobile liability insurance, and the broader field of indemnity law.

The propriety of a doctrine which "loads the dice" in favor of insurance companies (petitioners would have been concluded if judgment had gone for Wagner) is dubious. But whether the decision of the Court of Appeals is correct or not, it does go to the very core of indemnity law. Men and courts have understood for a century that a contract to indemnify against legal liability includes payment of legal liability settled by judgment against the indemnitee. And if a contract to indemnify against legal liability does not include such payment, the very meaning and premises of indemnity law become obscure. Yet the Court of Appeals holds "sometimes yes, and sometimes no" on the inclusion of such payment.

Since in the modern world the insurer-indemnitor is frequently a citizen of a state other than the state of the insured-indemnitee or the injured party, the federal courts are continuously engaged in deciding cases affected by the new doctrine. While the federal courts continue to exercise jurisdiction based on diversity of citizenship, the federal judicial system owes an obligation to the states to avoid separatism in decision, and, we respectfully submit, the introduction of confusinon into local law.

The decision of the Court of Appeals, if left unreviewed, has already unsettled the law in Virginia. Virginia law on estoppel by judgment is plain enough (see paragraph number 2, *supra*), but the Court of Appeals doubts that judgment by estoppel is not controlled by federal decisions. See *American Surety Co. of New York v. Babb,* 74 F. (2) 542, 544. the imminence of a probable

return to liability in the state court for the insurer and no liability for the insurer in the federal court is apparent. And other federal circuits are but one step removed from the same danger.

We suggest that the time of the Court is best conserved by review of the decision below and examination now of the new doctrine it conceives lest, otherwise, its inevitable and numerous progeny plague the Court in the future.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition should be granted.

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CHARLES ELMORE CROPLE
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 569

HENRY M. BEVERAGE, Administrator of the Estate of Dennis Roscoe Beverage, Deceased, CLARENCE BERLIN BEVERAGE, HILDA LOUISE GUM, MARGIE H. SIMMONS, Administratrix of the Estate of James Edward Simmons, Deceased, and JANIE HELMICK GUM, Administratrix of the Estate of Dorothy Mae Helmick, Deceased,

Petitioners,

v.

FARM BUREAU MUTUAL AUTOMOBILE INSURANCE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE FARM BUREAU MUTUAL AUTOMOBILE INSURANCE COMPANY IN OPPOSITION

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Appleman, Insurance Law and Practice, Vol. 7, p. 76, Sec. 4312 5

3 C.J. 592, Tit. Appeal and Error, Sec. 429 4

31 C.J. 425, Tit. Indemnity, Sec. 17 5

4 C.J.S. 326, Tit. Appeal and Error, Sec. 152 4

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 569

HENRY M. BEVERAGE, Administrator of the Estate of Dennis Roscoe Beverage, Deceased, CLARENCE BERLIN BEVERAGE, HILDA LOUISE GUM, MARGIE H. SIMMONS, Administratrix of the Estate of James Edward Simmons, Deceased, and JANIE HELMICK GUM, Administratrix of the Estate of Dorothy Mae Helmick, Deceased, *Petitioners,*

v.

FARM BUREAU MUTUAL AUTOMOBILE INSURANCE COMPANY, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE FARM BUREAU MUTUAL AUTOMOBILE INSURANCE COMPANY IN OPPOSITION

OPINIONS BELOW

References to the official reports of the opinions delivered in the courts below are correctly set forth by the petitioners (Pet., p. 1).

JURISDICTION

The respondent agrees that jurisdiction of this Court exists under the section of the Judicial Code cited by the petitioners (Pet., p. 1).

RESTATEMENT OF THE QUESTIONS PRESENTED

Since the respondent does not entirely agree with the petitioners' statement of the questions presented, they are given below in accordance with its views:

1. In a matter of private litigation, will this Court grant certiorari to a judgment of a Court of Appeals remanding a case to the District Court for a trial on the merits?

2. Are judgments awarded against an insured, on account of his intentional act, within the coverage of an automobile liability policy insuring against liability imposed by law for damages caused by accident and providing in one of its conditions that assault and battery shall be deemed an accident unless committed by or at the direction of the insured?

3. Is an automobile liability insurer precluded from asserting a policy defense by judgments in prior actions by injured third parties against its insured when the grounds of its policy defense were not, and could not have been, litigated in the prior actions?

RESTATEMENT OF THE CASE

Supplementing petitioners' statement of the case, it may be observed that the District Court expressly refrained from saying what his ruling would have been upon the issue of insurance coverage had he been permitted, under his view

of the law, to inquire into the question as to whether Wagner's act resulting in the petitioners' several judgments was negligent or intentional (R. p. 30). His decision was based upon his conclusion that the respondent was estopped to assert that Wagner's act was intentional, in view of the fact that the petitioners' several judgments were awarded in actions in which only negligence had been charged and in which the verdicts resulting in the judgments were rendered pursuant to instructions dealing only with negligence (R. pp. 20, 21, 42). In the Court of Appeals the petitioners urged, as an additional ground for affirmance to serve in the event that the basis of the decision in the District Court be found erroneous, their contention now again made to the effect that insurance coverage existed even if Wagner's act was intentional. In reversing and remanding to the District Court for a trial upon the issue of fact regarding the character of Wagner's act the Court of Appeals decided, as it was necessary for it so to do, both questions of law, namely, first, that no insurance coverage existed under respondent's policy if Wagner's act was in fact intentional (R. pp. 36-40), and, second, that the respondent was not estopped to establish as a fact, if it could, that Wagner's act was intentional (R. pp. 42-47).

ARGUMENT

A. In a Case of this Kind, Devoid of any Very Exceptional Circumstances, this Court Will Refuse Certiorari to Review a Judgment of a Court of Appeals Remanding a Case to a District Court for a Trial on the Merits.

Quite apart from the consideration concerning the correctness of the judgment of the Court of Appeals, there arises the preliminary question as to whether or not petitioners' application to this Court is not premature. The general

rule is, of course, that a court of last resort will not review on appeal or writ of error a judgment of an intermediate court reversing the judgment of an inferior court and ordering a new trial. 4 C.J.S. 326, Tit. Appeal and Error, Sec. 152; 3 C.J. 592, Tit. Appeal and Error, Sec. 429. That rule obtains in this Court. *Arnold* v. *United States,* 263 U. S. 427. Certiorari has been granted by this Court to avoid further futile proceedings in a District Court lacking jurisdiction or to decide a question of great importance involving the District Court's jurisdiction. *Stainback* v. *Mo Hock Ke Lok Po,* 336 U. S. 368; *Land* v. *Dollar,* 330 U. S. 731. The general practice here has been, however, in the absence of some very exceptional circumstance, to refuse certiorari until the whole case has been developed, reviewing at that time any errors in the judgment of the Court of Appeals remanding the case to the District Court for further proceedings. *Hamilton-Brown Shoe Co.* v. *Wolf,* 240 U. S. 251; *Panama R. Co.* v. *Napier Shipping Co.,* 166 U. S. 280; *American Constr. Co.* v. *Jacksonville, Etc. R. Co.,* 148 U. S. 372; *Chicago, Etc. R. Co.* v. *Osborne,* 146 U. S. 354.

Here, it is submitted, the petitioners should await the final determination of the case in the lower courts and, if unsuccessful, then seek a review in this Court with the record in such state that this Court, if it should then grant certiorari, might be in a position to enter final judgment, thus avoiding piece-meal review.

B. The Judgment of the Court of Appeals Relative to Coverage under Respondent's Policy is not in Conflict With the Local Law.

There appears to be no decision of the Virginia Supreme Court of Appeals specifically deciding whether an intentional act on the part of an insured under an automobile public

liability policy is within the phrase "caused by accident" appearing in the insuring clause. In the absence of such a decision it must be assumed that the local law is in accordance with the general rule recognized by the courts which have considered the point. Under this rule the consequences of an intentional act on the part of the insured himself are not covered. *Huntington Cab Co.* v. *American Fidelity & Casualty Co.,* 155 F. 2d 117 (CCA 4th); *Sheehan* v. *Goriansky,* 321 Mass. 200, 72 N. E. 2d 538, 173 A. L. R. 497; *Appleman, Insurance Law and Practice,* Vol. 7, p. 76, Sec. 4312; 45 C. J. S. 887, *Tit. Insurance,* Sec. 829; 5 *Am. Jur.* 796, *Tit. Automobiles,* Sec. 518; and Annotations 111 *A. L. R.* 1043, 117 *A. L. R.* 1175.

The conclusion of the Court of Appeals to the effect that "the policy in suit could not legally cover and was not intended to cover such conduct as Wagner was guilty of, or to idemnify him for the consequences of his crime" (R. p. 36), would seem to be universally supported by the authorities. 42 *C. J. S.* 573, *Tit. Indemnity,* Sec. 7; 31 C. J. 425, *Tit. Insurance,* Sec. 17. This principle that a contract to indemnify for the consequences of a future criminal act would be void upon the grounds of public policy is recognized in Virginia. *Kemper* v. *Kemper,* 3 Rand. (24 Va.) 8. This principle, of itself, would preclude adoption of the petitioners' construction of the insuring clause in respondent's policy.

Neither Section 38-238 of the Code of Virginia (Michie) 1950, nor the Virginia Motor Vehicle Safety Responsibility Act (Sections 46-386 to 46-501 of the Code cited) have changed the public policy of Virginia concerning the point here at issue. The former merely subrogates the injured party to the rights of the insured and allows the maintenance of an action, in certain cases, by such injured party against the insurer under the terms of the policy, as the

Court of Appeals correctly held (R. p. 47). In so doing it applied the local law, which holds that the judgment creditors have the same rights as the insured and nothing more. *State Farm Ins. Co.* v. *Arghyris,* 189 Va. 913, 55 S. E. 2d 16; *Hunter* v. *Hollingsworth,* 165 Va. 583, 183 S. E. 508; *Indemnity Co.* v. *Davis' Adm'r.,* 150 Va. 778, 143 S. E. 328. In holding that the public policy of Virginia in this regard had not been affected by the latter statute (R. p. 40), the Court of Appeals correctly interpreted the local law, as was later decided by the Supreme Court of Appeals of Virginia. *State Farm Ins. Co.* v. *Arghyris, supra.*

C. The Judgment of the Court of Appeals Relative to the Inconclusiveness of Petitioners' Judgments against Wagner Upon the Issue of Insurance Coverage is not in Conflict with the Local Law.

While the courts of Virginia recognize the general rule, usually incompletely stated to the effect that an indemnitor is bound by the judgment in the action by the third party against the indemnitee, the reason given for the rule is that the indemnitor "has the right to appear and defend the action, and has the same means and advantages of controverting the claim as if he were the real and nominal party upon the record." *Title Corp.* v. *Tie Co.,* 152 Va. 698, 148 S. E. 815, quoting from the opinion in *Washington Gas Co.* v. *District of Columbia,* 161 U. S. 316. But under Virginia law, as would appear to be the law everywhere, persons responsible over, by contract or by operation of law, are not true privies to the judgment debtor. *Richmond* v. *Sitterding,* 101 Va. 354, 43 S. E. 562. If responsible over by contract the principle of estoppel cannot be invoked to bind them beyond the terms of their undertaking. *Henrico Justices ex rel. Craddock* v. *Turner's Adm'x.,* 6 Leigh (33 Va.) 116. It is only where by the terms of the contract of indem-

nity the indemnifying party has agreed to pay any judgment against the indemnitee, without restriction, that such judgment will be treated as absolutely conclusive of the liability over. *Crawford et als* v. *Turk, Sheriff,* 24 Gratt. (65 Va.) 176. If the matters at issue in the action against the indemnitor were not submitted to the jury finding a verdict against the indemnitee, or if submitted could not have been legally adjudicated by them, no question of estoppel can arise. *Allebaugh* v. *Coakley et als,* 75 Va. 628.

In accordance with local practice in Virginia, when the insured is sued by the injured third party, the defense of that action can only be made in the name of the insured. The question as to whether or not the insurer is liable to the injured party can be litigated only after he has obtained judgment against the insured. *Employers' Liability* v. *Taylor,* 164 Va. 103, 178 S. E. 772. When action is brought to determine the liability of the insurer, the injured third party is not to be considered as suing upon his judgment against the insured, but as suing upon the contract of insurance, to which suit the insurer may make any defense which it could have made had the insured paid the judgment and brought an action for reimbursement. *Indemnity Co.* v. *Davis' Adm'r., supra.* If the original action against the insured is upon a claim not insured against by the policy, the duty of the insurer is to refrain from interfering in any way with the insured in respect to his defense of the case. *Accident Corp.* v. *Washington Co.,* 148 Va. 829, 139 S. E. 513. When suit is brought against the insurance company the first question always is, has the plaintiff a judgment "against a party who clearly comes within the provisions of the policy fixing the status of an insured"? *Indemnity Co.* v. *Small, Adm'x.,* 154 Va. 458, 153 S. E. 685.

The case of *London Guar. Co.* v. *White & Bros.,* 188 Va. 195, 49 S. E. 2d 254, is authority for the respondent, not

the petitioners. In that case the injured party's complaint against the insured alleged a claim within the policy, but the insurer mistakenly refused to defend. After settling with the injured party the insured sued for reimbursement. The Supreme Court of Appeals of Virginia held the insurer liable because it turned out, on full development of the facts in the action on the policy, that the loss was one insured against.

While it is thought to be perfectly clear that this case is governed by local, rather than by federal, law, it would seem immaterial to pursue that question at any length. This Court has held that an indemnitor is not estopped to show the true facts in relation to an issue not involved in an action against his indemnitee. *State Farm M. Auto. Ins. Co.* v. *Coughran,* 303 U. S. 485; *George A. Fuller Co.* v. *Otis Elevator Co.,* 245 U. S. 489. The Courts of Appeal of the various Circuits follow the same rule. *Ætna Life Ins. Co. of Hartford, Conn.* v. *Maxwell,* 89 F. (2d) 988 (CCA 4th); *Western Indemnity Co.* v. *Crafts,* 140 Fed. 1 (CCA 6th). The cases cited by the petitioners as being indicative of a conflict (Pet. p. 8) do not support that contention. In *Jones* v. *Zurich General Accident and Liability Ins. Co.,* 121 F. (2d) 761 (CCA 2nd), the insurer waived its policy defense. In *Alabama Title & Trust Co.* v. *Millsap,* 71 F. (2d) 518 (CCA 5th), the facts upon which one aspect of coverage depended were directly at issue in the action against the insured and the conclusive existence of such facts was conceded on appeal. In *B. Roth Tool Co.* v. *New Amsterdam Casualty Co.,* 161 Fed. 709 (CCA 8th), the liability to indemnify was as broad as the liability of the insured to the injured party and the very ground on which coverage under the policy depended was at issue and fully litigated in the first action. The report of *International*

Indemnity Co. v. *Steil,* 30 F. (2d) 654 (CCA 8th), does not disclose any defense on the part of the insurer.

CONCLUSION

While it is believed that it would be contrary to the practice in this Court to grant a writ of certiorari in this case at this stage, that is, before the trial on the merits in the District Court, the writ prayed for should be denied in any event upon the ground that the Court of Appeals correctly interpreted and applied the law of Virginia to the issues presented before it. The respondent could not have litigated the question as to whether Wagner's act was negligent or intentional in the actions in which the petitioners' several judgments were awarded and it is entitled to its day in court on that issue.

Respectfully submitted,

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